for all these reasons I would dismiss the appeal with costs.

In the light of our decision in this appeal, it may not be out of place for me to express the hope that consideration may elsewhere be given as to the desirability of validating all writs, totalling several hundreds, so we have been informed from the Bar, issued in the name of the Yang di-Pertuan Agong between 9th August 1965 and the date when the Republic of Singapore Independence Act 1965 was published in the Government *Gazette*.

Tan Ah Tah F.J.: I agree.

Buttrose J.: I agree.

Appeal dismissed.

Solicitors: *Murphy & Dunbar; Rodyk & Davidson.*

LIM SU SANG v. TECK GUAN CONSTRUCTION & DEVELOPMENT CO. LTD.

[F.C. (Thomson L.P., Pike C.J. (Borneo) and Gill J.) February 24, 1966]

[Jesselton — Federal Court Civil Appeal No. 68 of 1965]

Arbitration — Agreement in writing containing arbitration clause — Arbitration clause containing blanks — Whether effective — Sabah Arbitration Ordinance, s. 6.

In this case the respondents had commenced proceedings to recover the balance due for work done and materials supplied under a building contract. The building contract was in a standard form and contained an arbitration clause, which had however, blanks where the name of the arbitrator should have been filled in. The appellants sought to have the proceedings set aside on the ground that what was involved was a dispute in connection with the agreement and was therefore subject to the arbitration clause in the agreement. At the trial McGilligan J. held that the action related to a dispute in connection with the agreement but that the arbitration clause was void for uncertainty and he dismissed the application. The appellants appealed.

Held: (1) it was clear from the arbitration clause that it was the intention of the parties that any dispute that might arise should be settled by arbitration and in such circumstances in the absence of an appointment of an arbitrator by the parties, section 6 of the Sabah Arbitration Ordinance clearly gave a right to either party to ask for an appointment by the court;

(2) the action in this case related to a dispute in connection with the agreement to which the arbitration clause applied and therefore the proceedings should be stayed.

Cases referred to:—

(1) *Willesford* v. *Watson L.R.* 8 Ch.D. 473, 480.

(2) *Hillas & Co.* v. *Arcos Ltd.* 147 L.T. 503.

(3) *Davies Middleton and Davies Ltd.* v. *Cardiff Corporation.* The Times 16th January, 1964.

(4) *London and North Western Railway* v. *Billington* [1889] A.C. 79.

FEDERAL COURT.

V. Kumar for the appellant.

J. Treleaven for the respondent.

Cur. Adv. Vult.

Thomson L.P.: This appeal arises from proceedings between Teck Guan Construction and Development Company Limited (whom I shall call "the contractor") and one Lim Su Sang, trading as Sabah Housing Society (whom I shall call "the employer").

On 30th December, 1961, the parties entered into an agreement in writing under which the contractor undertook to build a number of houses for the employer on a housing estate at Tuaran Road, Jesselton, which the employer was engaged in developing. That agreement, which was based on a standard form prepared by the Royal Institute of British Architects, was long and detailed and contained an arbitration clause the material portions of which are as follows:—

"Provided always that in case any dispute or difference shall arise between the employer or the architect on his behalf and the contractor, either during the progress or after the completion or abandonment of the works, as to the construction of this contract or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith.....then either party shall forthwith give to the other notice in writing of such dispute or difference, and such dispute or difference shall be and is hereby referred to the arbitration and final decision of

[*Space left blank*]

or, in the event of his death or unwillingness or inability to act, of a person to be appointed on the request of either party by the

[*Space left blank*]

and the award of such arbitrator shall be final and binding on the parties."

On 26th May, 1965, the contractor issued a writ against the employer which was specially endorsed as follows:—

"*STATEMENT OF CLAIM*

The plaintiff's claim is for the balance of account for work done and materials provided by the plaintiff for the defendant at his request at Tuaran Gardens Housing Estate, Jesselton.

Particulars

1965 April 30 Revised contract sum	$423,839.80
Extra works	40,308.00
	$464,147.80
Less payments on account	$407,834.00
	$ 56,313.80"

The employer entered an appearance and then without taking any further step applied to have the proceedings stayed on the ground that what was involved was a dispute in connection with the agreement of 30th December, 1961, and was therefore subject to the arbitration clause in that agreement.

The supporting affidavit referred to the agreement and the arbitration clause in particular The only portions of it which are now material are as follows:—

"1. This action is brought to recover the balance of account for work done and materials provided by the plaintiff for the defendant at his request at Tuaran Gardens Housing Estate, Jesselton.

. . . . . .

7. I have a good defence to the said action."

The application was made under section 5 of the Sabah Arbitration Ordinance and I would pause here to observe that though by the terms of that section the court has a discretion in relation to such applications nevertheless it is a discretion which, in the absence of any reason being shown to the contrary, should be exercised in favour of the applicant. As was said with regard to the similar provisions of section 11(1) of the Common Law Procedure Act, 1854, by Lord Selborne in the case of *Willesford* v. *Watson*:— [1]

"If parties choose to determine for themselves that they will have a domestic forum instead of resorting to the ordinary courts, then since that Act of Parliament was passed a *prima facie* duty is cast upon the courts to act upon such an agreement."

The application was opposed on the grounds that the action did not arise from a dispute in connection with the written agreement and that in any event by reason of the blank spaces in the arbitration clause which have been indicated that clause was void for uncertainty.

McGilligan J. dealt with the matter in a judgment which, with respect, I would describe as admirably lucid and concise. He came to the conclusions that the action related to a dispute in connection with the agreement but that the arbitration clause was void for uncertainty. He accordingly dismissed the application.

Against that decision the employer has now appealed.

With regard to the arbitration clause, it would be wrong, and in any event fruitless, to speculate as to why the blanks in the clause were not filled in before the agreement was executed. It may have been due to sheer carelessness. It may have been that up to the very time of execution the parties were not *ad idem* as to the identity of the arbitrator. It may be that they had in mind the provisions of section 6 of the Arbitration Ordinance to which I shall come shortly and that in view of the fact that the agreement was clearly going to take a considerable time to complete the question of who was to be an arbitrator could well wait till the necessity for one arose.

All that, however, is beside the point for, though it is abundantly clear from the clause as it stands that it was the intention of the parties that any dispute that might arise should be settled by arbitration, yet when it is considered in isolation the omission to fill in the blanks would of course leave the intention of the parties as to who was to be the arbitrator or as to how he was to be appointed so uncertain as to deprive it of any effect. The clause is not, however, to be considered in isolation; it is to be considered in the light of section 6 of the Sabah Arbitration Ordinance, which is the same as section 10 of the United Kingdom Act, 1950, and the material portions of which read as follows:—

"6. (1) In any of the following cases—

(a) where a submission provides that the reference shall be to a single arbitrator and all the parties do not after differences have arisen concur in the appointment of an arbitrator;

. . . . . .

any party may serve the other parties....with a written notice to appoint an arbitrator, umpire, or third arbitrator.

(2) If the appointment is not made within seven clear days after the service of the notice, the court may on application by the party who gave the notice appoint an arbitrator,.....who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties."

By section 2, "submission" is defined as "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not". And by section 4 and clause (a) of the Schedule a submission as thus defined is to be deemed to include in the absence of anything to the contrary a provision that the reference shall be to a single arbitrator.

There is nothing in the present case to exclude the operation of section 6 and once the intention and consequent agreement to go to arbitration are clear then in the absence of any appointment of an arbitrator it would seem to be undoubtedly clear that either party is entitled to ask for an appointment by the court. After all, as was said by Lord Tomlin in *Hillas & Co. Ltd.* v. *Arcos Ltd.*,[2] the law should not "incur the reproach of being the destroyer of bargains".

Support for that view is to be found in the case of *Davies Middleton & Davies Ltd.* v. *Cardiff Corporation*.[3] That was a case where there was an arbitration clause which was the same as the one in the present case (the *R.I.B.A.* standard form). The first blank space, as here, was not filled in; the second was filled in by inserting a reference to a person to be appointed by the president or vice-president of the Royal Institute of British Architects who had, in fact, declined to make an appointment. A dispute having arisen, an application was made to the court under section 10 of the Arbitration Act and an arbitrator was appointed. The corporation appealed against the decision appointing the arbitrator but the appeal was dismissed.

Sellers L.J. said the corporation had contended that since no name had been inserted in

the blank space in the clause and the words following it had not been deleted, the parties had not intended to submit to arbitration. Alternatively they contended that as it stood the clause was so meaningless and uncertain as to be void. He could not accept either contention. By the Arbitration Act, 1950, the court had power to appoint an arbitrator when the parties had agreed to submit to arbitration and had not nominated an arbitrator. The parties in the present case had clearly intended to submit their disputes to arbitration. Parties commonly agreed to submit to arbitration without naming an arbitrator at the outset of their contract and there was much to commend that practice. There was nothing therefore in the point that an arbitrator was not named nor in the fact that the words following the blank space were left in. In the absence of a name those words were of no effect and could be ignored.

Pearson L.J. concurring, said that the clause was not too uncertain to be valid because of the provisions of the Arbitration Act, 1950, empowering the court to appoint an arbitrator when the parties had manifested an intention to submit to arbitration. However, the president of the Royal Institute of British Architects probably had no power of appointment because the words following the blank space were a condition precedent. In view of the court's power of appointment, the point about the right of the president to appoint did not arise.

For myself I find it wholly impossible to distinguish the present case from *Davies Middleton & Davies Ltd.* v. *Cardiff Corporation, supra,* and, with respect, I would agree with what is clearly its *ratio decidendi,* that is that given a clear intention to submit to arbitration and given the provisions of section 10 of the Arbitration Act enabling the court to appoint an arbitrator when none is named by the parties the result clearly follows that the court has a discretion to exercise its powers under the section if asked to do so.

It is true that in the present case the appellant has not yet taken steps to ask that such an appointment be made. In his affidavit, however, he has made it clear that he wishes to submit to arbitration, the present proceedings are a necessary preparatory step prior to his making such an application and if no such application is made timeously the respondent will have his remedy and the appellant will presumably pay a heavy penalty in the way of costs.

Before departing from this part of the case mention should be made of the following passage from *Hudson* on "Building Contracts"* on which the respondent to some extend relied.

> "The R.I.B.A. form of contract contains a blank space in the arbitration clause for insertion of the name of the arbitrator. If the name is not filled in, or the words 'or in the event of his death or unwillingness or inability to act' struck out in accordance with the footnote to the contract, the arbitration clause would, it seems, be too uncertain to have any effect."†

That statement clearly can no longer be accepted without qualification. It should, however, be remembered that this was published in 1959, that is prior to the Court of Appeal decision in *Davies Middleton & Davies Ltd.* v. *Cardiff Corporation.*

Turning now to the second aspect of the appeal, it has been contended for the respondents that even if the arbitration clause be good the substantive action, which is for payment for work done, does not constitute a dispute to which the clause applies and therefore proceedings in it should not be stayed. This contention was based on another passage from *Hudson's* book which reads as follows:—

> "The effect of there being no dispute within an arbitration agreement is that the court has no power to stay an action. Thus if a trader persists is not paying for goods delivered to him without disclosing any substantive defence, this is merely a refusal to pay and not a dispute, and an action brought for the money will not be stayed on account of an arbitration clause."

With respect, unless the second sentence in that passage is read by way of exegesis of the preceding sentence it is too widely expressed. The case cited in support of it is *London and North Western Ry.* v. *Billington.*[4] In that case, however, although an attempt was made to invoke an arbitration clause that clause was not a term of the contract between the parties, which was a contract of carriage. The railway company's private Act empowered it to charge a reasonable sum in addition to tonnage rates for certain services rendered to traders and proceeded:—

> "Any difference arising under this section shall be determined by an arbitrator to be appointed by the board of trade at the instance of either party."

In accordance with its powers under the Act the company imposed a charge of 6d. a day by way of siding rent in respect of wagons remaining on its premises after a certain time. The trader, who was the appellant in the House of Lords, knew of this charge but although he protested he went on using the company's services without exercising his right to have the reasonableness of the charge submitted to arbitration. When sued by the company in respect of the charge he said that the reasonableness of the charge was a question between him and the company and should therefore be submitted to arbitration.

This, however, did not succeed.

Lord Halsbury L.C. said this (at p. 81):—

* 8th Ed. (1959) p. 489.

† The passage in question has been altered in the 9th Ed. (1965) of *Hudson* on "Building Contracts".

"I propose to give no opinion upon the true construction of the statute, except this: that a condition precedent to the invocation of the arbitrator on whatever grounds is that a difference between the parties should have arisen; and I think that must mean a difference of opinion before the action is launched either by formal plaint in the county court or by writ in the superior courts. Any contention that the parties could, when they are sued for the price of the services, raise then for the first time the question whether or not the charges were reasonable and that therefore they have a right to go to an arbitrator, seems to me to be absolutely untenable."

And Lord Ludlow summarised the matter as follows (at p. 82):—

"this difference is a difference which ought to have arisen before action brought, and that it is too late afterwards to raise a difference which can be brought within the meaning of this section. It is sufficient for the purpose of this case to say that it is concluded by the finding of the county court judge. As I understood that finding (and it is final), it is that there was no difference existing between the parties at the time the action was brought."

In the present case, however, it is difficult to see how it can be said that there is no dispute in connection with the agreement between the parties and that the arbitration clause is a term of that agreement. Under and by reason of the agreement there is an obligation on the contractor to do certain work and an obligation on the employer to pay for it. On the material before us what the contractor has sued to enforce is the employer's obligation to pay which arises from that agreement. He has not mentioned the agreement in terms in his statement of claim as endorsed on the writ but the employer has said in his affidavit that if there is any obligation it is under the agreement and that has not been denied; the contractor has not said for instance that he is suing on a *quantum meruit* or to enforce any other sort of obligation that does not arise from the agreement or anything of the sort. The employer says he has a good defence, that is, he says he is subject to no obligation under the agreement which can be enforced against him. In the circumstances how can it be said that there is no dispute in connection with the agreement?

I would allow the appeal with costs.

Pike C.J. (Borneo): I agree with the judgment of the learned Lord President which I have had the opportunity of reading. I would but add that in my opinion not only must the arbitration clause be considered in the light of the statutory provisions referred to by the learned Lord President in his judgment but it must also be considered in the context of the agreement as a whole, clause 3 of which seems clearly to indicate an intention at the time of execution to include an arbitration clause in that it confers on the arbitrator mentioned in the condition a specific duty in relation to the appointment of new architects should such an appointment become necessary and should the parties be unable to agree as to the appointment.

Gill J.: I have had the benefit of reading the judgment of the Lord President in this appeal.

I agree that this appeal should be allowed with costs.

Appeal allowed.

JAYAS v. PUBLIC PROSECUTOR

[A.Cr.J. (Azmi J.) February 24, 1966]

[Johore Bahru — Criminal Appeal No. 17 of 1965]

Road Traffic — Insurance — Using a vehicle without 3rd party risk insurance — Appellant an employee — Necessity to produce evidence — Road Traffic Ordinance, 1958, s. 74(3).

The appellant had been convicted for using a vehicle without a valid carriers' licence and without third party insurance. He was fined $20 on the first charge and $50 on the second charge and was also ordered to be disqualified for 12 months. He appealed on the ground that the sentence was excessive. On appeal it was stated that the appellant was an employee but no evidence was produced at the trial to this effect.

Held: where a person wishes to rely on the proviso to subsection (3) of section 74 of the Road Traffic Ordinance he must produce evidence to show that the vehicle does not belong to him, that he is an employee and had no knowledge that a policy of insurance was not in force; and magistrates should draw the attention of persons unrepresented by counsel to the provisions of the proviso.

CRIMINAL APPEAL.

G. Murugaiyan for the appellant.

Tungku Zaid bin Tungku Zakaria (Deputy Public Prosecutor) for the respondent).

Azmi J.: The accused was convicted on the following two charges:

"1st Charge:

That you on the 29th day of May, 1965 at about 12.45 p.m. at Jalan Scudai, Johore Bahru, in the State of Johore, being the driver of motor van No. T. 5897, did use the said vehicle for the carriage of goods without a valid carrier's licence, and that you thereby committed an offence punishable under section 98(1) of the Road Traffic Ordinance No. 49 of 1958.

2nd Charge:

That you on the same date, time and place, in the State of Johore, did use motor van No. T. 5897 without there being enforced in relation to the user of the said vehicle such a policy of Insurance of Third Party Risk, and that you thereby committed an offence under section 74 (1) punishable under section 74(2) of the Road Traffic Ordinance No. 49 of 1958."

by the learned magistrate at Johore Bahru and was fined $20 on the first charge and $50 on the second charge and was also ordered to be disqualified from holding or obtaining a driving licence for Class 'D' vehicles for 12 months under section 74(2). The appeal was against sentence and the ground of appeal says as follows: